

STATE OF MICHIGAN
COURT OF APPEALS

CECILY DORAN GARRITY,

Plaintiff-Appellant,

v

MATTHEW ISAAC JANGER,

Defendant-Appellee.

UNPUBLISHED

November 26, 2013

No. 312253

Washtenaw Circuit Court

LC No. 10-001423-DM

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Cecily Doran Garrity, appeals as of right the trial court's order granting the motion of defendant, Dr. Matthew Isaac Janger, for attorney fees. The trial court awarded Dr. Janger \$20,278.75 in attorney fees and costs. Because the trial court abused its discretion by awarding Dr. Janger attorney fees related to Garrity's appeals when it had no jurisdiction to do so, we reverse \$18,278.75 of the trial court's award. We affirm the trial court's award of \$2,000 in attorney fees related to Dr. Janger's motions in the trial court.

I. FACTS

A. FACTUAL BACKGROUND

Since Garrity filed for divorce in June 2010, the parties have embroiled their three minor children in a virtually continuous and highly contentious custody battle. In May 2011, the trial court held a five-day bench trial and, on June 9, 2011, the trial court ordered that the children live with Dr. Janger in Maine until its final decision.

On August 24, 2011, the trial court stated in an order that it had reviewed all the evidence but had not had time to write and issue a full decision. In light of the impending start of the minor children's school year, the trial court indicated that it was releasing its legal conclusion: granting Dr. Janger custody of the children during the school year, granting Garrity custody of the children during summer vacation, and providing for split holidays and visitation. The trial court stated that it would issue its findings of fact and conclusions of law no later than September 15, 2011. The trial court's order also provided that Garrity's "physical parenting time [was] not to start until October 15."

On September 14, 2011, Garrity filed an application for leave to appeal in this Court, which we denied on October 18, 2011.¹ On September 16, 2011, the trial court issued its opinion and order containing its findings concerning the children's best interests and granting custody as indicated above.

On September 21, 2011, Dr. Janger moved for clarification, alleged that (1) Garrity believed that the trial court's final order prohibited her from seeing the children at any time other than those provided in the order, and (2) the trial court's order did not indicate whether the parties could agree to further parenting time by written mutual consent. The trial court subsequently clarified that the parties could "reach written agreements regarding parenting time"

On October 28, 2011, Garrity appealed as of right the trial court's judgment of divorce. On November 1, 2011, Dr. Janger moved the trial court for attorney fees under MCR 2.114 on the basis that he had incurred excessive costs because of Garrity's frivolous actions. According to Dr. Janger, his unnecessary costs included (1) responding to Garrity's application for leave to appeal, (2) filing his motion for clarification, (3) filing his motion for attorney fees, and (4) responding to Garrity's appeal as of right. Dr. Janger also asserted that he did not have the funds to pay his attorney fees and that Garrity had at least \$200 a month in unnecessary expenses.

On May 17, 2012, a panel of this Court affirmed the trial court's custody decision.² Dr. Janger subsequently filed a supplemental motion for attorney fees and costs under MCR 2.114(D) and 7.208(I).

B. ATTORNEY FEE AWARD

At the hearing on Dr. Janger's motion for fees and costs, Garrity testified that she filed her application for leave to appeal because she was concerned that she would lose her appeal of right if she waited until the trial court's final decision. Garrity also testified that Dr. Janger's motion for clarification was necessary because she believed that the trial court's custody order prohibited her from seeing the children until October 15, 2011.

On August 17, 2012, the trial court entered its decision and order regarding Dr. Janger's request for attorney fees. The trial court found that Garrity's explanations for her actions did not "make sense." It also found that (1) Garrity's application for leave was frivolous, (2) the motion to clarify whether the parties could reach other agreements concerning parenting time was unnecessary and attributable to Garrity (3) Dr. Janger's motion for attorney fees was caused by Garrity's actions that improperly increased the costs of litigation, and (4) Garrity's appeal as of right was frivolous because "[t]he arguments she brought were not well grounded in law" and

¹ *Garrity v Janger*, unpublished order of the Court of Appeals, entered October 18, 2011 (Docket No. 306101).

² *Garrity v Janger*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2012 (Docket No. 306956).

she was unlikely to prevail. The trial court found that \$20,278.75 of Dr. Janger’s requested fees and costs were reasonable—\$8,278.75 for his response to Garrity’s application for leave to appeal; \$10,000 for his response to Garrity’s appeal as of right; \$1,000 for his motion for attorney fees; and \$1,000 for his motion for clarification. It ordered Garrity to pay \$200 a month toward Dr. Janger’s fees.

II. ATTORNEY FEES

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews de novo questions of law, including the interpretation and application of statutes and court rules.³ This Court reviews for clear error the trial court’s findings of fact concerning an award of attorney fees.⁴ This Court reviews for an abuse of discretion the trial court’s decision to award attorney fees.⁵ The trial court abuses its discretion when its decision results in an outcome that falls outside the reasonable and principled range of outcomes.⁶

To properly preserve an issue, a party must raise the issue before the trial court.⁷ “We need not address issues first raised on appeal.”⁸ Here, Garrity did not contend below that the trial court did not have jurisdiction to award Dr. Janger attorney fees concerning her appeals. Thus, this issue is unpreserved.

This Court will generally decline to address unpreserved issues unless “a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case.”⁹ Here, we will address this issue because it involves a question of law for which we are aware of the necessary facts, Garrity proceeded below in propria persona, and the caselaw that Garrity relies on was released after the trial court’s decision in this case.

However, Garrity did not raise her public policy arguments below. We decline to address these unpreserved arguments on appeal.

³ *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005); *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012).

⁴ *Reed*, 265 Mich App at 164.

⁵ *Id.*

⁶ *Ewald v Ewald*, 292 Mich App 706, 725; 810 NW2d 396 (2011).

⁷ *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

⁸ *Id.*

⁹ *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007) (quotation marks and citations omitted).

B. LEGAL STANDARDS

Generally, a party may only recover attorney fees from another party if a statute, court rule, or common-law exception provides for them.¹⁰ MCR 3.206(C) provides that a party may request attorney fees in a divorce action and, if doing so, must allege his or her need and the other party's ability to pay:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, . . .

MCL 552.13(1) provides statutory authority under which a trial court may award attorney fees in a divorce action:

[T]he court may require either party . . . to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. . . .

MCL 552.13(1) also authorizes the trial court to award attorney fees if a party's wrongful conduct caused the other party to incur unnecessary fees.¹¹ To award fees on this basis, the trial court must find that (1) the party committed misconduct, and (2) the misconduct caused the other party to incur legal fees.¹² The trial court's fee award for misconduct must be only for those fees that are necessary and reasonable.¹³

C. FAILURE TO EXPLICITLY ADDRESS MCR 3.206(C)

Garrity asserts that the trial court erred by failing to make findings concerning the parties' relative needs and abilities to pay before awarding Dr. Janger attorney fees. We disagree.

MCR 3.206(C) provides the means by which the trial court may award attorney fees pursuant to court rule.¹⁴ However, the trial court's power to award fees on the basis of a party's misconduct is a common-law exception to the general rule that a party generally must pay his or

¹⁰ *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004).

¹¹ *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992); *Reed*, 265 Mich App at 164-165.

¹² *Reed*, 265 Mich App at 165; *Stackhouse*, 193 Mich App at 445.

¹³ *Stackhouse*, 193 Mich App at 445.

¹⁴ *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003).

her own attorney fees.¹⁵ The court rule and common law exception are different and have different requirements.¹⁶

Here, Dr. Janger moved the trial court for attorney fees on the basis that the fees were unnecessary because of Garrity's conduct. The trial court found that Garrity committed misconduct and that those actions caused Dr. Janger to incur unnecessary attorney fees. We conclude that the trial court did not abuse its discretion by failing to make findings concerning the parties' needs and abilities to pay because Dr. Janger moved the trial court for fees under the common-law exception allowing attorney fees on the basis of a party's misconduct. Dr. Janger did not base his motion on financial need under MCR 3.206(C).

Garrity also contends that the trial court abused its discretion by not clearly indicating under which authority it was awarding the attorney fees. We disagree.

Here, the trial court based its award of attorney fees on its findings that Garrity's actions were unwarranted, frivolous, inappropriate, and increased the costs of the litigation. Michigan statutory and caselaw authorized the trial court to award attorney fees on this basis. We decline to conclude that the trial court abused its discretion solely because it failed to explicitly state the authority under which it was awarding attorney fees.

D. ATTORNEY FEES FOR FRIVOLOUS APPEAL

Garrity contends that the trial court erred because it did not have jurisdiction to award Dr. Janger attorney fees and costs concerning her appeals to this Court. We agree.

In *Edge v Edge*, this Court held that the trial court abused its discretion in awarding the plaintiff attorney fees on the basis that the defendant's appeal to this Court was frivolous.¹⁷ In *Edge*, the plaintiff moved the trial court under MCR 2.114(D) and (E), MCR 7.208(I), and MCR 3.206(C) for attorney fees and costs that the plaintiff incurred in defending against the defendant's appeal.¹⁸

This Court reasoned in *Edge* that MCR 7.216(C) and 7.219(I) allow *this* Court to award sanctions and attorney fees for vexatious appeals, but that the *trial court* does not have jurisdiction to tax costs incurred on appeal.¹⁹ We also reasoned that MCR 2.114 does not grant

¹⁵ *Grace v Grace*, 253 Mich App 357, 371; 655 NW2d 595 (2002).

¹⁶ *Reed*, 265 Mich App at 164-165.

¹⁷ *Edge*, 299 Mich App at 124.

¹⁸ *Id.* at 123-124.

¹⁹ *Id.* at 128-129. See *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 562; 528 NW2d 787 (1995).

the trial court authority to grant a party appellate attorney fees or costs.²⁰ Finally, we reasoned that MCR 7.208(I) also does not grant the trial court authority to award appellate attorney fees or costs.²¹

Here, Dr. Janger moved the trial court for attorney fees under MCR 2.114 and MCR 7.208(I), asserting in part that Garrity's September 14, 2011 application for leave to appeal and her October 28, 2011 appeal as of right were frivolous. These were the same court rules advanced by the plaintiff in *Edge* to justify fees related to the defendant's appeals in that case. Here, as in *Edge*, the trial court lacked the jurisdiction to impose attorney fees and costs on the basis that Garrity's appeals to this Court were frivolous. Therefore, the trial court abused its discretion by awarding Dr. Janger attorney fees related to Garrity's appeals.

Dr. Janger contends that this Court should not retroactively apply our decision in *Edge*. We disagree. This Court gives judicial decisions full retroactive effect unless full retroactivity will result in injustice.²² If retroactivity would result in an injustice, we may give precedent prospective-only application.²³ However, "decisions are retroactive unless 'exigent circumstances' justify the 'extreme measure' of prospective-only application."²⁴ The threshold question to determine whether to give a decision prospective-only application is whether the new decision "clearly establishes a new principle of law."²⁵

Michigan caselaw firmly establishes that a party does not have a general right to recover attorney fees in a divorce action.²⁶ Further, in *Edge*, this Court relied on decisions in previous cases—*DeWald v DeWald* and *Reeves v Reeves*—to conclude that the trial court does not have jurisdiction to award attorney fees and costs on the basis of a frivolous appeal to this Court.²⁷ Though the *Edge* Court addressed aspects of our court rules that neither *DeWald* nor *Reeves* addressed, we conclude that the *Edge* Court did not clearly establish a new principle of law.

Thus, we conclude that the trial court abused its discretion awarding Dr. Janger attorney fees related to Garrity's appeals.

²⁰ *Edge*, 299 Mich App at 133. See *DeWald v Isola (After Remand)*, 188 Mich App 697, 703; 470 NW2d 505 (1991).

²¹ *Edge*, 299 Mich App at 137.

²² *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002).

²³ *Id.* at 696.

²⁴ *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 401; 738 NW2d 664 (2007).

²⁵ *Id.* at 400-401.

²⁶ *Reed*, 265 Mich App at 164; *Stackhouse*, 193 Mich App at 445.

²⁷ *Edge*, 299 Mich App at 131-133.

III. CONCLUSION

We reverse the trial court's imposition of (1) \$8,278.75 in attorney fees related to Garrity's application for leave to appeal and (2) \$10,000 in attorney fees related to Garrity's appeal as of right, because the trial court lacked jurisdiction to award fees and costs related to Garrity's appeals. Because we conclude that the trial court did not abuse its discretion by failing to make findings under MCR 3.206 or failing to state the legal authority under which it awarded fees, we affirm the trial court's imposition of \$2000 in attorney fees related to Dr. Janger's motions before the trial court.

We affirm in part, reverse in part.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Amy Ronayne Krause